Supreme Court, U.S.
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No. 03-687

In The Supreme Court of the United States

R. J. REYNOLDS TOBACCO CO.,

Petitioner,

v.

FLORENCE KENYON, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF FLOYD J. KENYON, SR.,

Respondent.

On Petition For A Writ Of Certiorari To The Florida Second District Court Of Appeal

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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REASONS FOR NOT GRANTING THE WRIT

An overriding reason for not granting the petition for writ of certiorari in this case is that the Petitioner, R. J. Reynolds Tobacco Company ("Reynolds"), has misrepresented the proceedings in the Florida state courts below. Reynolds claims in its petition that this case presents the following question: "Whether state law permitting a jury to impose liability on tobacco companies for the mere manufacture and sale of cigarettes, without more, conflicts with and is preempted by congressional policy allowing the production and sale of cigarettes in the United States." No such question is presented by this case, and there is no Florida state law or policy which imposes liability on cigarette manufacturers on this basis.

Reynolds was not found liable for merely producing and selling cigarettes. Rather, utilizing principles employed in product liability cases generally, a jury found Reynolds strictly liable for producing and selling defectively designed cigarettes and awarded Respondent $165,000 in damages. That same jury found in Reynolds' favor on Respondent's three other theories of liability, a result facially inconsistent with Reynolds' claim that Florida law imposes automatic liability on tobacco companies merely for producing and selling cigarettes.

Reynolds' assertion that the Florida trial and appellate courts "permitted cigarette manufacturers to be held liable under state tort law for merely manufacturing cigarettes" (Pet., p. 2), is refuted even by the limited trial excerpts included in Reynolds' appendix, as well as by materials Reynolds failed to bring to this Court's attention. For example, Reynolds relies heavily on the denial of its request for a special jury instruction that it was legal

for Reynolds to manufacture, sell and advertise cigarettes and that Reynolds could not be held liable on that basis. Pet., pp. 4-5. However, the record demonstrates that the reason the trial court rejected Reynolds' request for this non-standard instruction was not because it disagreed with its substance, but because the trial court concluded that its content was already embodied in other instructions. The trial court stated at the charge conference: "I think that the way the instruction is currently crafted, articulating the standards under state law by its very nature recognizes the fact that products were manufactured legally by your [client]." Pet. App. 28a. Thus, far from endorsing automatic liability for cigarette manufacturers, the trial court acknowledged on the record Reynolds' legal right to manufacture and sell cigarettes; it simply declined to give a redundant instruction on concepts already embodied in existing instructions.

Reynolds further argues that "Kenyon's counsel argued throughout the trial as if Reynolds could be held liable for simply manufacturing and selling cigarettes." Pet., p. 5. Reynolds' principal "factual support" for this claim is that, during the cross-examination of a Reynolds employee, Dr. David Townsend, "Kenyon's counsel repeatedly elicited testimony to establish that no cigarette is safe." Pet., p. 6. Reynolds quotes excerpts from that cross-examination in its petition. *Id.*

What Reynolds fails to disclose is that this issue and evidence was interjected into the trial by Reynolds itself long before Dr. Townsend testified. During the cross-examination of plaintiff, Floyd Kenyon (Mr. Kenyon has since died, and Respondent is his estate), Reynolds' counsel elicited testimony from Mr. Kenyon that he did not remember ever having seen a statement by Reynolds that

cigarettes were safe to smoke or were not dangerous to a smoker's health:

> Q. And when we asked in your deposition if you'd ever seen any statement by R. J. Reynolds that cigarettes were safe to smoke, you said no, you didn't remember any such statement? Correct?
>
> A. Yes.
>
> Q. Correct?
>
> A. Yes.
>
> Q. And you've also testified when we took your deposition that you don't remember any statement you ever heard from R. J. Reynolds that cigarettes are not dangerous to your health? You never heard Reynolds say it was not dangerous to your health; correct?
>
> A. That's correct.

App. 16-17.

Reynolds' cross-examination of Respondent's expert, Dr. Allan Goldman, was even more direct. Reynolds' counsel not only elicited Dr. Goldman's opinion that there was no safe cigarette (an opinion identical to Dr. Townsend's), but also asked Dr. Goldman if he was aware that it was also Reynolds' position that there was no safe cigarette:

> Q. Now, as you testified before, you agree that there's no such thing as a safe cigarette? Correct?
>
> A. Not so far, correct.

* * *

> Q. And are you aware of R. J. Reynolds' position that there is no safe cigarette? Did you know that?
>
> A. I do now.

App. 14.

Further, in closing argument, Reynolds' counsel affirmatively relied on Dr. Townsend's testimony that there was no safe cigarette, claiming this knowledge was the reason Reynolds had "worked diligently to try to make a cigarette safer":

> And Dr. Townsend told you, there's no such thing as a safe cigarette. There's no such thing as a safe cigarette. But Reynolds has worked hard. Reynolds has worked diligently to try to make a cigarette safer, to try to reduce the health risks that are inherent in cigarettes. Knowing that cigarettes have health risks, knowing that are inherent in cigarettes. Knowing that cigarettes have health risks, knowing that there is no safe cigarette, our society has nevertheless decided that those should be legal, lawful products for adults who choose to smoke. The evidence is uncontradicted here that Reynolds spent tremendous amounts of time, money and energy on its cigarette design efforts.

App. 1-2.

Reynolds' claim that Respondent's questioning of Dr. Townsend on whether there was a "safe cigarette" demonstrates that Reynolds was held liable merely for manufacturing and selling cigarettes is frivolous. Reynolds presented the same evidence in its examination of Respondent's witnesses before Dr. Townsend testified, and

Reynolds even affirmatively relied on Dr. Townsend's "safe cigarette" testimony in its closing argument.

Reynolds also attempts to support its argument by citing to isolated phrases culled from the thousands of pages of transcript in this multi-week trial; many of these citations are incomplete and misleading. For example, Reynolds claims that Kenyon's counsel described his position at the charge conference in the following terms: "Kenyon was 'injured by a defective product' that 'shouldn't have been available to him in the that they were in. Period.'" Pet., p. 7. Kenyon's counsel's actual quote was as follows: "What we contend is that they should have cured the defect in the products that he smoked. And that they shouldn't have been available to him in the form that they were in. Period. That's what the plaintiff contends, that they were defective and unreasonably dangerous in that sense." Pet. App. 26a. When the language Reynolds has omitted is included, it becomes apparent that Kenyon's counsel was arguing that cigarettes containing the uncured defects Respondent had proved at trial should not have been available to his client, not that it was inherently improper to market cigarettes *per se*.

Reynolds also implies that, at the hearing on Reynolds' motion for directed verdict, Kenyon took the position that Reynolds could be held liable simply for manufacturing and selling cigarettes; as "authority" for this claim, Reynolds cites to a portion of the transcript in which Kenyon's counsel does not even speak. Pet., p. 8. In fact, Kenyon's counsel took exactly the opposite position at the hearing, advising the court that he was not contending that Reynolds was liable because they sold cigarettes, but that their liability was based on other tortious conduct which had been proved at trial:

> Essentially, what Reynolds is now arguing is that they should have some sort of sovereign immunity because Congress said you could sell a cigarette; but there's a lot more to it than just the fact it might have been legal to sell them. They did other things that were tortious, and that's what we had to prove. We didn't prove our case simply on the basis that they were liable because they sold cigarettes. We had a lot of other elements to prove, and we proved it.

Pet. App. 17a.

In summary, Reynolds' claim that it was held liable in the Florida courts for merely manufacturing and selling cigarettes is a fabrication. Rather, the jury found that design defects in the cigarettes Respondent smoked made them more dangerous than they should have been.

Ample evidence of these design defects was also presented at trial. For example, evidence was presented of alternative cigarette designs developed by Dr. Claude Teague, Reynolds' assistant director of research and development, during the late 1960's. A current Reynolds employee claimed these ideas "didn't go anywhere" because "those concepts weren't reduced to practice and demonstrated to actually work." App. 7. This misses the point. It was Reynolds that could have, and should have, reduced Dr. Teague's concepts to practice.

There was also evidence of alternative, safer designs whose technological feasibility was undisputed, such as a greater use of reconstituted tobacco. Reconstituted tobacco is made by taking small pieces of tobacco and some tobacco stems, adding water, then extracting the water with a centrifuge. The solid material which is left is then rolled into a sheet. The tobacco reconstitution process has been

known since at least the late 1940's, when Reynolds claims to have invented it. App. 4-5.

Reconstituted tobacco, when it burns, generates less tar and nicotine than regular tobacco. Despite its health advantages, reconstituted tobacco is typically used in only 15% to 20% of a cigarette's blend. The only reason offered by Reynolds' expert for not using a higher percentage was that "if you get to very high levels, it starts altering the taste characteristics and it's really not acceptable." App. 5-6.

Most shocking, however, was the evidence that the methods by which Reynolds' tobacco was processed greatly enhanced the cancer-causing properties of natural tobacco. Testimony was offered regarding the "flue-curing" of tobacco, a process in which tobacco is heated inside enclosed barns or sheds by means of propane heaters. Flue-cured tobacco contains dramatically higher levels of tobacco-specific nitrosamines[1] than natural tobacco because the exhaust gases from the propane heaters used to heat the tobacco contain nitric oxide, a toxic gas which reacts with the nicotine in the tobacco leaf during the flue-curing process to produce tobacco-specific nitrosamines. App. 10-11.

The "cure" for flue-curing is extraordinarily simple. The exhaust gases from the propane heaters are vented to the outside by a heat exchange process, rather than

---

[1] Nitrosamines are cancer-causing compounds known for their ability to produce cancer even in low concentrations, as well as by their ability to produce cancers in places far removed from the site of administration.

released inside the barn so that they can no longer react with nicotine in the tobacco leaf. This simple design change results in reductions of more than 90% in tobacco-specific nitrosamines. App. 11.

Reynolds' expert, Dr. David Townsend, acknowledged that Reynolds had identified the presence of nitrosamines in tobacco smoke in the 1960's, and of tobacco-specific nitrosamines in the 1970's. App. 9. However, at trial, more than thirty years later, Dr. Townsend admitted that the tobacco cured using the heat exchange process was just beginning to appear in cigarettes, and that it would be another two years before all Reynolds' cigarettes would contain this tobacco. App. 12.

Because Reynolds' contention that it was held liable merely for manufacturing and selling cigarettes is false, it is unnecessary to address Reynolds' arguments about the legal implications of this non-existent state of facts. Respondent notes, however, that Reynolds' petition also misinterprets this Court's prior precedents on the preemption of tobacco product liability actions.

Reynolds bases its legal argument on the claimed implied preemptive effect of the 1965 Federal Cigarette Labeling and Advertising Act (the "1965 Act"), and its successor, the Public Health Cigarette Smoking Act of 1969 (the "1969 Act"). However, in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) ("*Cipollone*"), this Court issued a definitive holding regarding preemption under both the 1965 and 1969 Acts, stating that their preemptive effect was limited to the express preemption of state laws incorporated into § 5 of each Act. Specifically, this Court held:

> In our opinion, the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. Such reasoning is a variant of the familiar principle of *expression unius est exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted. In this case, the other provisions of the 1965 and 1969 Acts offer no cause to look beyond § 5 of each Act. Therefore, we need only identify the domain expressly pre-empted by each of those sections.

505 U.S., at 517 (citations omitted).

This Court's holding in *Cipollone* that: "[t]he pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act," could not have been clearer. However, despite this "on all fours" precedent to the contrary, Reynolds argues in its petition that the 1965 and 1969 Acts impliedly preempt state law causes of action beyond those expressly preempted under § 5 of each Act. Reynolds essentially argues that *Cipollone* no longer represents controlling law because it was purportedly based on the now-discarded view that implied preemption cannot exist where a statute expressly pre-empts state law.

Reynolds' recipe for reaching this conclusion begins with *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), in which this Court held that the presence of express preemption provisions in a federal statute does not foreclose further implied conflict preemption of state law causes of action. Reynolds then mixes in selected statements from *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), to the effect that Congress has foreclosed the removal of tobacco products from the market and, from this brew, purports to distill the inference that the 1965 and 1969 Acts impliedly preempt any state law cause of action which adversely affects cigarette manufacture.

Under any circumstances, the reliance on such an inference as the basis for rejecting a recent and direct holding of this Court would be highly questionable; in this case, it is also demonstrably wrong. Reynolds' "analysis" ignores this Court's holding in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995) ("*Myrick*"), a decision which conclusively refutes not only the conclusion but also the rationale of Reynolds' argument. In *Myrick*, the court of appeals had interpreted *Cipollone* as announcing a categorical rule that implied preemption could not exist when Congress had chosen to include an express preemption clause in a statute. This Court granted certiorari to clarify that the presence of an express preemption clause in a statute does not foreclose the possibility of implied preemption. However, this Court also went on to expressly reaffirm *Cipollone*'s specific holding that the preemptive effect of the 1965 and 1969 Acts was governed exclusively by the express language of each Act: "In *Cipollone* we did hold that the pre-emptive scope of the two statutes at

issue was governed by the language in each act." 514 U.S., at 287-88.

The Court then went on to explain that its holding to that effect in *Cipollone* had not been based solely on the fact that each of these Acts included express preemption of certain state laws, but was the product of a conflict preemption analysis of these statutes, stating:

> Indeed, just two paragraphs after the quoted passage in *Cipollone*, we engaged in a conflict pre-emption analysis of the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282, as amended, 15 U.S.C. § 1311 *et seq.*, and found "no general inherent conflict between federal preemption of state warning requirements and the continued vitality of state common-law damages actions." 505 U.S., at 518, 112 S.Ct., at 2618.

514 U.S., at 288.

Myrick thus conclusively refutes Reynolds' core contention that *Cipollone* is no longer controlling because it was predicated on the view that an express preemptive clause precludes implied preemption. As *Myrick* makes clear, the *Cipollone* court fully appreciated that implied preemption could co-exist with an express preemptive clause, but simply held that, with respect to the 1965 and 1969 Acts, there was "no general, inherent conflict between federal preemption of state warning requirements and the continued vitality of state common-law damages actions." 514 U.S., at 289.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the petition.

Respectfully submitted,

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APPENDIX

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY CIVIL ACTION DIVISION

FLOYD J. KENYON, SR., and
FLORENCE KENYON, his wife

Plaintiffs,

-vs-

R. J. REYNOLDS
TOBACCO COMPANY,
a foreign corporation,

Defendants.
_____/

Case No. 00-5401
Division: "D"

TRANSCRIPT OF PROCEEDINGS

BEFORE:	THE HONORABLE HERBERT BAUMANN Circuit Judge
TAKEN AT:	Courtroom Number 5 Hillsborough County Courthouse Tampa, Florida
DATE:	10 December 2001
TIME:	Commencing at 1:30 p.m.
REPORTED BY:	Sherrill Lynn Jackson, RPR Notary Public, State of Florida

* * *

[3697] MS. PARKER: You heard Dr. Townsend testify about everything that Reynolds had done. You heard him talk about his colleagues, that these were hard-working people, they were good people, who were trying their best to create a safer cigarette.

And Dr. Townsend told you, there's no such thing as a safe cigarette. There's no such thing as a safe cigarette.

But Reynolds has worked hard. Reynolds has worked diligently to try to make a cigarette safer, to try to reduce the health risks that are inherent in cigarettes. Knowing that cigarettes have health risks, knowing that there is no safe [3698] cigarette, our society has nevertheless decided that those should be legal, lawful products for adults who choose to smoke.

The evidence is uncontradicted here that Reynolds spent tremendous amounts of time, money and energy on its cigarette design efforts. And it's also uncontradicted that Reynolds investigated every single serious suggestion on what to do to create a safer cigarette.

* * *

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY CIVIL ACTION DIVISION

FLOYD J. KENYON, SR., and
FLORENCE KENYON, his wife

Plaintiffs,

-vs-

Case No. 00-5401
Division: "D"

R. J. REYNOLDS
TOBACCO COMPANY,
a foreign corporation,

Defendants.
_____/

TRANSCRIPT OF PROCEEDINGS

BEFORE:	THE HONORABLE HERBERT BAUMANN Circuit Judge
TAKEN AT:	Courtroom Number 1 Hillsborough County Courthouse Tampa, Florida
DATE:	26 November 2001
TIME:	Commencing at 1:44 p.m.
REPORTED BY:	Sherrill Lynn Jackson, RPR Notary Public, State of Florida

* * *

[1783] MS. PARKER: Let's take this chart – the second chart down, filter modifications, and let's go to the next item you have on the chart here, and that's reconstituted tobacco.

And do you have a chart that explains to the jury about what reconstituted tobacco is?

DR. TOWNSEND: Yes (changing demonstrative aid).

MS. PARKER: What is it?

DR. TOWNSEND: Reconstituted tobacco is a process that Reynolds invented back in the late '40s, late 1940s. And the purpose of that invention was to take pieces of tobacco that was too small to make into a cigarette, real small pieces of tobacco, and reconstitute them and make them into pieces that are [1784] large enough to make into tobacco rods. So, that was the basic reason that Reynolds originally invented.

The basic process looks something like this: You get small pieces, and even some stems, that come out of the leaf process. Because in leaf processing, they primarily don't have to look for laminate in between these stems. And then it generates a lot of small pieces as well. Some of it contains some stems, all of this material then goes into a centrifuge. Water is added. The water extracts a lot of tobacco solid – water solubles, includes compounds; also, includes nicotine.

So, all of this is extracted out. So, all of that is extracted out, and the water – the water extract goes over to a holding tank. The pulp that's left from that extraction – the cellulose pulp that's left is made into a paper sheet using conventional paper technology. So it's just like a paper sheet.

It comes out, the water soluble are sprayed or reapplied to the paper sheet and then it goes into to tobacco pulp, tobacco sheet. This is still tobacco, and then it goes

into a cutter and cut into pieces that are large enough to make into [1785] cigarettes. So, again, it's a way to take small pieces and turn them into bigger pieces.

MS. PARKER: Dr. Townsend, does Reynolds add nicotine in any of its – to the reconstituted tobacco that's used in any of its commercial cigarettes?

DR. TOWNSEND: No, it doesn't, and it never has.

MS. PARKER: How does – tell the jury, how does the tar and nicotine in a reconstituted tobacco sheet compare to the tar and nicotine in a tobacco sheet or tobacco that's just from the leaf, its not through this reconstituted process?

DR. TOWNSEND: Reconstituted tobacco, when it burns, generates less tar and less nicotine by virtue of two things: One is the stems and the materials that are used in making this generate less tar when burned. That's why it's general reduction technique. It also generates less nicotine because stems contain very really little nicotine – very little nicotine. And also some nicotine is lost in this process. So, of the nicotine that goes in, there's less out the back end of this process. So, this is a general reduction technique.

* * *

[1787] MS. PARKER: How long has Reynolds been using this [1788] reconstituted tobacco process?

DR. TOWNSEND: We first used it commercially when we introduced the Winston cigarette in 1954.

MS. PARKER: And has it been used in Camel cigarettes?

DR. TOWNSEND: Yes.

MS. PARKER: Has it been used in Salem cigarettes?

DR. TOWNSEND: Yes.

MS. PARKER: Was Reynolds' use of this process, this reconstituted tobacco process, was that in any way a secret?

DR. TOWNSEND: No, it really wasn't; and, in fact, our competitors tried to copy this process when they learned of it.

* * *

[1792] MS. PARKER: What percentage of a tobacco blend is reconstituted?

DR. TOWNSEND: Typically it would be on the level of 15 to 20 percent in the blend.

MS. PARKER: Why don't you use more than that?

DR. TOWNSEND: Well, because it's – If you get to very high levels, it starts altering the taste characteristics and it's really not acceptable.

* * *

[1908] MS. PARKER: Dr. Townsend, are you familiar with some documents authored by Claude Teague that reflect some ideas that he had from the late '60s about design alternatives?

DR. TOWNSEND: I'm familiar with a number of Dr. Teague's documents, yes.

MS. PARKER: Okay. And were any of Dr. Teague's beliefs about – set forth in these documents, were any of those safer, feasible alternative cigarette designs?

DR. TOWNSEND: I can't recall a single one that I would consider an alternate, safer cigarette design. I think Dr. Teague generated a lot of ideas and I think his ideas really, at least particularly on product development, didn't get into – didn't go anywhere. You know, mainly because they were really concepts and those concepts weren't reduced to [1909] practice and demonstrated to actually work.

* * *

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY CIVIL ACTION DIVISION

FLOYD J. KENYON, SR., and
FLORENCE KENYON, his wife

Plaintiffs,

-vs-

Case No. 00-5401
Division: "D"

R. J. REYNOLDS
TOBACCO COMPANY,
a foreign corporation,

Defendants.

_____/

TRANSCRIPT OF PROCEEDINGS

BEFORE:	THE HONORABLE HERBERT BAUMANN Circuit Judge
TAKEN AT:	Courtroom Number 1 Hillsborough County Courthouse Tampa, Florida
DATE:	26 November 2001
TIME:	Commencing at 9:08 a.m.
REPORTED BY:	Mary Elizabeth Blazer, RPR Notary Public, State of Florida

* * *

[1749] MS. PARKER: What is that? Will you tell the jury what are nitrosamines?

DR. TOWNSEND: Nitrosamines are a group of compounds, a class of compounds, that are formed when

secondary means react with nitric oxide or nitrates – [1750] particularly nitric oxide. And it forms a compound that's fairly reactive. So, it's a general class of compounds.

MS. PARKER: Are introsamines definitely in cigarettes smoke?

DR. TOWNSEND: Yes.

And back in the '60s, of course, that was one of questions was: Are nitrosamines found in cigarette smoke? And yes, there are a number of volatile nitrosamines found in cigarette smoke.

And then into the '80s – '70s, we found that there are, in fact, some nitrosamines that are specific to tobacco. And we call those tobacco-specific nitrosamines. They are found only in tobacco.

MS. PARKER: Here it is. I didn't see it at first. Could you write that up on the easel for us?

DR. TOWNSEND: Which part? Nitrosamines?

MS. PARKER: Maybe if you could put nitrosamines, and then you said there was some specific to tobacco? Maybe if you could – write that beside there.

DR. TOWNSEND: I'll call it tobacco-specific nitrosamines, TSNA.

MS. PARKER: All right.

DR. TOWNSEND: So, there are two types of [1751] nitrosamines. Regular nitrosamines that are found in tobacco smoke, and in other things, like bacon. And then there are tobacco-specific nitrosamines that are found only in tobacco.

MS. PARKER: Has Reynolds done anything to respond to the fact that there are nitrosamines in the smoke?

DR. TOWNSEND: Yes, we have.

In fact, a significant amount of work was conducted to figure out which nitrosamines were present, how much, and ways to reduce or eliminate them. And, in fact, the more volatile nitrosamines are selectively removed by ciliostatis filters. That's for the regular nitrosamines are non-tobacco specific.

Turning to the tobacco-specific nitrosamines. We've conducted a lot of research over the years. Again trying to quantify. These are very reactive molecules and very difficult to develop analytical test methods for them. We were successful. Quantitated the levels and we did successfully figure out how to reduce tobacco-specific nitrosamines in flue-cured tobacco.

And with that finding, we've actually put that into practice and are working on ways to reduce tobacco-specific nitrosamines in burning [1752] tobacco.

MS. PARKER: Is that process that you just told us about, about what Reynolds does, to try to reduce the – I call it TSNAs?

DR. TOWNSEND: TSNA.

MS. PARKER: TSNA. Is that something that Reynolds has kept secret or is that public or –

DR. TOWNSEND: No, actually we made our findings public.

What we found specifically, was we found that tobacco-specific nitrosamines are formed during the curing of tobacco, of flue-cured tobacco. So the farmer will take tobacco out of the field, place it in a barn, and then in that barn there's a propane burner to heat – heat the contents of the barn. And the farmer would actually raise the temperature inside the barn, hold it at a certain temperature for a certain period of time, and then raise it again to another temperature, hold it for a certain period of time. And there was a prescription or a program that the farmer goes through to cure the tobacco.

By having a propane burner in the barn, the exhaust gases from that propane burner actually contained a lot of nitric oxide. The nitric oxide [1753] that was in the exhaust gas which was in the barn reacted with the nicotine in the tobacco leaf and produced tobacco-specific nitrosamines. TSNAs are reaction products from nicotine and nitric oxide.

Once we discovered that, then the solution was pretty obvious, don't have the combustion gas in the barn during curing.

So, we went in and actually did field studies where we converted barns to heat exchange barns, a lot like a radiator, so the – exhaust gas from the burner never goes inside the barn, it goes through a heat exchanger, and then is vented outside, but the heat stays in the barn or supposed to be.

So, the farmer then in these field trials cure the tobacco with these heat exchanges and we found dramatic reductions, more than 90 percent reductions in TSNAs in flue-cured tobacco.

* * *

[1755] MS. PARKER: How far along is Reynolds now in implementing this process?

DR. TOWNSEND: We made the decision to convert all of our flue-cured tobacco to this low TSNA. As a result, we had to contract with farmers to do that. We had to convert all of the barns, any exchange barns. And we are well into that process.

In fact, some of the first tobacco that's been cured and aged – because tobacco has to go through an aging process as well – the first tobacco that's coming out of this, out of these contracts is starting to work its way to cigarettes now. It will happen within approximately two years from now, all of the flue-cured tobacco used will be low TSNA.

* * *

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R. J. REYNOLDS
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Defendants.

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TRANSCRIPT OF PROCEEDINGS

BEFORE:	THE HONORABLE HERBERT BAUMANN Circuit Judge
TAKEN AT:	Courtroom Number 1 Hillsborough County Courthouse Tampa, Florida
DATE:	20 November 2001
TIME:	Commencing at 1:30 p.m.
REPORTED BY:	Sherrill Lynn Jackson, RPR Notary Public, State of Florida

* * *

[1382] MS. PARKER: I have just a few more questions. Let me ask you some questions about your views on cigarettes.

DR. GOLDMAN: Okay.

MS. PARKER: Now, as you testified before, you agree [1383] that there's no safe cigarette? Correct?

DR. GOLDMAN: Not so far, correct.

MS. PARKER: And you don't even know if it's possible to produce a safe cigarette; correct?

DR. GOLDMAN: Correct.

MS. PARKER: And no United States government office or government agency has ever identified or endorsed any cigarette brand as safe; correct?

DR. GOLDMAN: Not that I know.

MS. PARKER: And similarly, no public health organization like the American Cancer Society or the American Lung Association – no public health society has ever endorsed a particular cigarette as being safe; correct?

DR. GOLDMAN: Not that I know, correct.

MS. PARKER: And are you aware of R. J. Reynolds' position that there is no safe cigarette? Did you know that?

DR. GOLDMAN: I do now.

* * *

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY CIVIL ACTION DIVISION

FLOYD J. KENYON, SR., and
FLORENCE KENYON, his wife

Plaintiffs,

-vs-

Case No. 00-5401
Division: "D"

R. J. REYNOLDS
TOBACCO COMPANY,
a foreign corporation,

Defendants.

_____/

TRANSCRIPT OF PROCEEDINGS

BEFORE:	THE HONORABLE HERBERT BAUMANN Circuit Judge
TAKEN AT:	Courtroom Number 1 Hillsborough County Courthouse Tampa, Florida
DATE:	19 November 2001
TIME:	Commencing at 1:40 p.m.
REPORTED BY:	Mary Elizabeth Blazer, RPR Notary Public, State of Florida

* * *

[1152] MS. PARKER: And, Mr. Kenyon, you've never told anyone that you believed that smoking cigarettes was safe; correct?

MR. KENYON: I never told anybody that I thought smoking cigarettes was safe.

MS. PARKER: And you never told anybody that you thought smoking does not cause lung cancer; correct?

MR. KENYON: I – I don't – I don't think I would even get into a conversation like that, no.

MS. PARKER: And no one has ever told you that the Surgeon General's warnings don't apply to you? No one has ever said that to you; isn't that correct?

MR. KENYON: No one has ever said that to me.

MS. PARKER: And you've never seen a newspaper article or a magazine article that said smoking was safe; correct?

[1153] MR. KENYON: Well, I have read and seen smoking advertisements which gave the connotation that smoking was safe, yes.

MS. PARKER: Well, I'm going to ask you about ads in a few minutes. I'm asking now about newspapers and magazine articles, articles that appeared.

MR. KENYON: I have not.

MS. PARKER: You have never seen one that says smoking was safe?

MR. KENYON: Not that I remember.

MS. PARKER: And when we asked in your deposition if you'd ever seen any statement by R. J. Reynolds that cigarettes were safe to smoke, you said no, you didn't remember any such statement? Correct?

MR. KENYON: Yes.

MS. PARKER: Correct?

MR. KENYON: Yes.

MS. PARKER: And you've also testified when we took your deposition that you don't remember any statement you ever heard from R. J. Reynolds that cigarettes are not dangerous to your health? You never heard Reynolds say it was not dangerous to your health; correct?

MR. KENYON: That's correct.

MS. PARKER: And also in your deposition, you [1154] testified that you don't remember ever hearing R. J. Reynolds say that cigarettes are healthy?

MR. ACOSTA: Your Honor, I need to object. That's not a proper issue.

THE COURT: I'll overrule. Go ahead and answer, if you can.

MR. KENYON: Say it again.

MS. PARKER: During your deposition, you testified also that you never remember hearing any statement from R. J. Reynolds that cigarettes are healthy? Correct?

MR. KENYON: I – correct.

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